Adoption and Foster Care Alliance
of
New Mexico

December 15, 2005

Sent Via E-Mail and
Federal Express
U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
SA-29
2201 C Street NW
Washington, D.C. 20520

Docket No.: State/AR-01-96,
Re: Adoption and Foster Care Alliance of New Mexico's Comments on the proposed 22 CFR Part 96.

Dear Sir or Madam:

The Adoption and Foster Care Alliance of New Mexico is a voluntary alliance of individuals and agencies interested in providing services to children out of their biological homes. Its purpose is to promote such services, including, but not limited to promoting adoption. Additionally, it also serves to provide appropriate, loving and nurturing families for children and promoting foster care placement as a positive alternative family experience. This purpose also finds expression through the promotion of good practice in the delivery of services to all significant parties involved in the life of the child being served through the promulgation of procedures, policies, regulations, and the like. The underlying principle in all functions of the Alliance is to serve as an advocate for children.

The State of New Mexico has a surface area of approximately 121,598 square miles. Its population is approximately 1,819,046. There are approximately 82 licensed social workers and agencies that are approved by the New Mexico Children, Youth and Families Department to provide adoption services; of which only a handful provide adoption services for placement of foreign born children.

In reviewing and commenting on the proposed regulations, it is important to keep in mind the goals and purposes of The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions (The Hague), and the Intercountry

Adoption Act of 2000 (IAA). The Hague and the IAA both are for the protection of the children, birth parents and adoptive parents. The purpose of The Hague is also to prevent abuses such as abduction, sale or trafficking of children; ensure proper consent for adoptions; allow for child's transfer to the receiving country and establish adopted child's status in receiving country. The additional purposes of the IAA is to protect children and prevent abuses against children, birth families and adoptive parents in convention adoptions and ensure that adoptions are in the best interests of the child. It also improves the ability of the federal government to assist in adoptions from the United States and abroad.

We respectfully request and recommend that the Department of State issue an interim ruling on the Regulations, with a period for further public comment. This will encourage a proactive resolution to those issues raised by all those who have participated in this initial commentary period as well as those particular issues we have noted below.

The Adoption and Foster Care Alliance of New Mexico submits their comments on the proposed regulations cited as 22 CFR Part 96, as follows:

Subpart B, Sec. 96.4 Designation of accrediting entities by the Secretary.

This section implies that the Secretary of State has the inherent power to designate as few as one entity to perform the accreditation and/or approval functions. The Intercountry Adoption Act allows for "any" public or private entity to become an accrediting entity. The New Mexico Children, Youth and Families Department (CYFD) already provides for the accreditation, oversight, enforcement, and information management in connection with adoptions in general and it meets the requirement of the IAA. There are similar agencies within the other states.

Consequently, the Alliance suggests that those state agencies, in general, and CYFD, in particular, be the accrediting entity for those adoption services providers located within their states. The reasons are fourfold:

1) the States must retain control over all aspects of the adoption process within its boundaries;
2) CYFD and corresponding agencies in other states can ensure that the requisite changes to the laws and regulations area accomplished, thereby improving and maintaining adoption standards;
3) There would be uniformity and consistency with the application of laws and regulations by all parties involved in the process; and
4) A separate non-profit private entity (most likely outside of New Mexico and within a handful of states) would be outside the control of the State which makes room for conflicting requirements and inconsistent applications of laws and regulations with no central state oversight authority.

It would be a legitimate state interest that they retain control over all aspects of the adoption process within their respective boundaries, while adhering to the federal requirements of The Hague, IAA and the regulations.

Subpart B. Sec. 96.10 Suspension or cancellation of the designation of an accrediting entity by the Secretary.

The process and the appellate process for an accrediting entity that is subject to a final action of suspension or cancellation is incomplete. It is important for all those involved in the contractual agreement to know in advance the process in which the Secretary of State or his designee will investigate a complaint and how he will determine whether an accrediting entity is in "substantial compliance" with the laws and regulations. In light of this subjective standard, it is even more important that there be a formal process to follow in the event the Secretary of State decides that an accrediting entity has fallen "substantially" out of compliance since he may automatically suspend or cancel the designation of an accrediting entity. Currently, there is no proposed administrative process to allow the entity to find out why it has been found neither to be substantially out of compliance nor to allow it to take measures to become substantially within compliance. The only recourse is to file a petition in U.S. District Court either in the District of Columbia or where the entity is located, in order to set aside the suspension or cancellation. The Alliance suggests that there should be an appeal process in order to save time and money, for all parties involved rather than seeking the more expensive litigious route.

Subpart B, Sec. 96.33 Budget, audit, insurance, and risk assessment requirements.

Section 96.33(e) – It is imperative that adoption service providers have a sound financial basis. However, the requirement that an agency or individual maintain cash reserves equivalent to three months of operating expenses would be unduly burdensome on New Mexico placing agencies and individuals. There are adoption service providers who have smaller volumes of business or whom have account receivable for governmental entities. In the event an unexpected expenditure should arise, again a small agency would be out of compliance. It should be sufficient to provide a quarterly balance sheet, or some other financial documentation to show the fiscal health of the organization.

Section 96.33(g) - This provision requires an independent professional risk assessment, however it does not specify what constitutes this assessment. There needs to be guidance for the agencies in determining exactly what is "an independent" risk assessment. Furthermore, the evaluation is asking to assess the risk of adhering to the regulations (i.e. using supervised providers, disallowance of blanket waivers, and accepting strict liability for all aspects of a placement.) which are unknown at this time. Keep in mind that this will place an additional unnecessary financial burden on an adoption service provider. Interestingly, this provision appears to conflict with, or at least is diminished by Section 96.33(h). What is the purpose of an independent professional risk assessment if there is a minimum amount of liability insurance imposed on an adoption service provider? This purpose of the risk assessment needs to be clarified.

Section 96.33(h) – The designation of a specific minimum amount of liability insurance assumes that all adoption providers are created equal. The number of placements of foreign born children in New Mexico is different than placements of foreign born children in more heavily populated states which in turns affect the income, operating expenses, exposure to risk and the like. It is also important to note that it is not only difficult for agencies to obtain liability

insurance but sometimes the cost can prohibitive. The requirement that an agency or person maintain liability insurance of at least $1,000,000 per occurrence will only serve to financially crush an agency or other adoption service provider. In the State of New Mexico, an adoption of a foreign born child ranges from approximately $18,000 to $25,000. In such a situation, the $1,000,000 per *occurrence* would only serve as an open invitation to transform an adoptive placement into an adversarial process. The Alliance does not oppose the idea of maintaining a sufficient amount of liability insurance, however there should be a more reasonable minimal amount of insurance per occurrence and a reasonable amount in the aggregate. There is also the open question of whether there would be any coverage available for the proposed strict liability provision of the regulations. The minimum amount may be required. Otherwise, this requirement will serve no other purpose than to throw the baby out with the bath water.

Section 96.33(i) - Although this provision requires that the chief executive officer, chief financial officer and other officers or employees who have any responsibility for financial matter be bonded, the regulation does not provide any guidance on the amount of the bond(s). This needs to be clarified.

Section 96.37(f) – Although we recognize the intent of the regulation to ensure professional standard, this provision is conflicting. We also recognize that New Mexico's current licensing laws and regulations are similar to the regulations, but they also provide for "grandfather" provisions. Consequently, it is recommended that social work supervisors be qualified under the regulations if they are licensed in a relevant field under state law. This would allow for consistency with a state.

Additionally, it was noted in the regulations that it has already been considered that supervised provider cannot do both a pre-placement study and post placement report (since that would be more than one adoption service, requiring an accredited/supervising provider). This would appear to be poor social service practice since it severs the continuity in providing services in a particular placement. We need to keep in mind the aforementioned goals of protection the children, birth family and adoptive parents when considering such a provision.

Section 96.39(d) – The term "blanket waiver of liability" must be further defined for the adoption service providers. This is especially important since the adoption providers have been put in the position of accepting liability for all persons and organizations both within and outside United States. There are circumstances beyond the adoption service providers' control, whether it is a placement of a foreign born child or a child born in the United States, and they should not bear that additional liability.

The adoption service providers and the prospective adoptive families knowingly and willing enter into contractual relations that will govern their relationship and the adoptive placement. It is important to be upfront with the prospective adoptive families that there are circumstances beyond the control of the placing agency and that they cannot guarantee a perfect adoption. In the event the service provider does not adhere to the terms of the contract, there are existing causes of action in contract and tort law for breach of contract, and negligent or intentional actions or inactions. Imposing yet another layer or unknown liability will create a

rippling effect that will further negatively affect the issue of obtaining professional liability insurance for such unknown coverage.

Subpart B, Sec. 96.45(b)(8) and (c)(1) Using Supervised Providers in the United States.
Subpart B, Sec. 96.45(b)(9) and (c)(1) Using Supervised Providers in the United States.

These provisions, in essence, hold an agency, as the primary provider, strictly liable for all participants in an entire adoption process, whether for unintentional or intentional acts. Section 96.45(b)((8) and 96.36(b)(9), requires the primary provider to retain legal responsibility for each case in which adoption services are provided. Pursuant to Sections 96.45(c)(1) and 96.46(c), the primary providers must assume tort, contract and other civil liability to the prospective adoptive parents. The Agencies must be responsible for their own actions or inactions; however these all encompassing provisions are an incredibly heavy burden for any agency. If the Department of State personnel truly have a strong background in consular affairs, personal and/or professional experience with foreign adoption as proposed by IAA, then it should be readily apparent how absurd it would be to agree to retain legal responsibility for foreign providers, whom you have virtually no control over.

There are numerous reasons why strict liability cannot be imposed upon adoption service providers: No one person can guarantee a mentally and physically healthy child (clinical impressions based on tests available in developing countries may be different than later developments and more sophisticated testing); unforeseen political events can either disrupt the adoption process or make it impossible to finalize; an accredited agency in the U.S. following all requirements for professional personnel domestically cannot guarantee the same overseas. Theoretically, they could station qualified U.S. personnel there, but at a large financial cost.

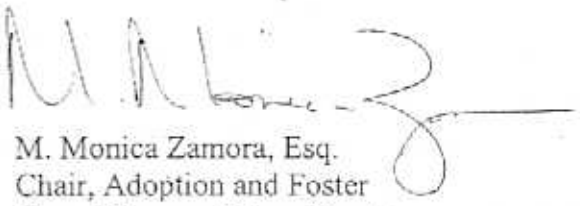
Again, such a responsibility would only be passed on through the fees and costs charged prospective adoptive families. Moreover, we would imagine that an insurance provider is going to sit up and take notice of an agencies agreement to retain legal responsibility for foreign persons or entities and consequently deny them coverage for those outside the jurisdiction of the United States. Consequently, foreign adoptions will be limited to individuals making deals with other individuals, agencies or countries that may not have comparable standards or the best interests of the child at heart. This defeats the purposes of The Hague, IAA and the regulations.

The Adoption and Foster Care Alliance of New Mexico agrees with the goals and purposes of The Hague, IAA and the regulations. However, we do not want to blindly reach for those goals and purposes at the expense of our adoption service providers. The comments on the regulations are for purposes of keeping in line with the ultimate responsibility to protect the child, the birth families and the adoptive parents.

Sincerely,

Lisa H. Olewine, MSW, JD
President-Elect, Adoption and Foster
Care Alliance of New Mexico

Sincerely,



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Chair, Adoption and Foster
Care Alliance of New Mexico,
The Hague Committee